



STATE OF WISCONSIN
Division of Hearings and Appeals

In the Matter of

DECISION

[REDACTED]
[REDACTED]
[REDACTED]

WWW/145739

PRELIMINARY RECITALS

Pursuant to Wis. Stat. §49.152(1), petitioner filed a request for a Wisconsin Works (W-2) fact finding review with PSI, a W-2 agency, on October 19, 2012. A fact finding review was held and a fact finding decision was issued on November 7, 2012.

Petitioner timely appealed to the department from the fact finding decision on November 19, 2012. See Wis. Stat. §49.152(2)(b), (c). The fact finding file was received by the Division on December 13, 2012.

The issue for determination is whether the W2 agency correctly denied an extension of the Petitioner's W-2 benefits based on a lack of medical documentation to prove that she could not perform work activities, denial of SSI and denial of DVR services.

There appeared at that time and place the following persons:

PARTIES IN INTEREST:

Petitioner:

[REDACTED]
[REDACTED]
[REDACTED]

Represented by:

Patricia DeLessio
Legal Action of Wisconsin
230 West Wells Street, Room 800
Milwaukee, WI 53203

Wisconsin Department of Children and Families
201 East Washington Avenue, Second Floor
Madison WI 53703-2866

By:

Wisconsin Works (W-2)
PSI
6550 N. 76th St.
Milwaukee, WI 53223

FACT FINDER: Maya Robinson

ADMINISTRATIVE LAW JUDGE: Debra Bursinger

Division of Hearings and Appeals

FINDINGS OF FACT

1. The Petitioner (CARES # [REDACTED]) is a resident of Milwaukee County.
2. The Petitioner is 40 years old. Diagnoses include degenerative disc disease in her lower back and neck with nerve damage to her hip, back and legs. Further diagnoses include asthma, TMJ, obesity, mood disorder due to general medical condition and panic disorder.
3. The Petitioner's last job was in 2003.
4. The Petitioner applied for Social Security disability three times and was denied each time. The most recent denial was upheld on appeal in July, 2012. At the time of the fact-finding hearing in this case, the Petitioner had commenced further appeal proceedings which were pending.
4. Prior to September 1, 2012, the Petitioner was participating in and receiving W-2 benefits in a W-2 transitional (W2T) placement.
5. On June 6, 2012, the Petitioner met with her W-2 worker. At that time, the W-2 worker informed the Petitioner that she had used 126 months on her W-2 60 month clock. She also informed the Petitioner that more time would not be requested due to having no newly identified barriers. The W-2 worker offered the barrier screening tool (BST) to the Petitioner but the Petitioner declined it.
6. On June 28, 2012, a Medical Examination and Capacity Form was completed by Dr. Christopher Withers. The physical capacities assessment is as follows: 10 lb maximum ability to lift and carry on an occasional basis; 10 lb maximum ability to lift and carry on a frequent basis; no more than 2 hours standing and walking during an 8 hour day; no more than 2 hours sitting during an 8 hour day. The physician noted the following activities can rarely be performed by the Petitioner: looking up or down, turning head, holding head static, twisting, stooping/bending, crouching/squatting, climbing ladders or stairs, grasping with objects with hands, fine finger manipulation, reaching arms. The physician opined that the Petitioner's impairments are acute more than twice/month so that she would be absent from work and/or W-2 activities on those days. He indicates the Petitioner's medications or treatment cause drowsiness so that it impacts her ability to participate in a work/education environment. He concludes that she can participate in work/work readiness activities for 2 hours/day, 5 days/week.
7. On June 29, 2012, the Petitioner submitted a Medical Examination and Capacity Form that was completed by Dr. Pamela Thomas-King on June 17, 2012. The physician indicates that the Petitioner's symptoms started in 2004. The treatment plan includes medication management, physical therapy and interventional therapy to alleviate pain to a tolerable level. The form did not rate the Petitioner's physical capacities, psychological condition or functional capacity. The doctor indicated that the treatment plan has not produced any significant pain reduction. She also indicated that the Petitioner's impairments result in about three "bad" days/month. It indicates that the Petitioner's treatment or medications cause nausea and drowsiness which may impact her ability to participate in a work/education environment. The doctor concluded the Petitioner can participate in work/work readiness activities 3 days/week, 4 hours/day including basic education/literacy, job readiness/life skills workshops, job skills training.
8. On June 29, 2012, a Mental Health Report was completed by Mark Steven Fossie. The psychotherapist noted that the Petitioner has depression, a mood disorder due to her general medical condition and a panic disorder. He indicated marked functional limitation in her activities of daily living, moderate difficult in maintaining social functioning, frequent deficiencies of concentration, persistence or pace resulting in failure to complete tasks in a timely manner and repeated episodes of deterioration or decompensation in work or work-like settings. He opined that her impairments would be acute more than twice/month so that the Petitioner would be absent from work and other W-2 activities. He concluded that she cannot participate in work/work readiness activities based on her emotional and mental health impairments.

9. On July 6, 2012, the Petitioner signed a Participant Program Activity Plan with the W-2 agency. The Plan was scheduled to begin July 6, 2012 and to be reviewed on August 31, 2012. The Petitioner supplied the worker with medical forms (referenced here in Findings of Fact #6, 7 and 8). The worker indicated to the Petitioner that because the medical forms indicated she was partially able to participate in work activities, the worker would not request an additional extension of W-2. The worker offered the Petitioner a case management services (CMD) placement. The Petitioner declined the CMD placement offer. An appointment was scheduled for August 24, 2012 to discuss the CMD placement and other services for transition. The Petitioner did not attend the August 24, 2012 appointment.
11. On September 5, 2012, the agency issued a Notice of Eligibility, Wisconsin Works (W-2) to the Petitioner informing her that her eligibility would end on August 31, 2012 because her time limit would expire.
12. On September 14, 2012, the Petitioner contacted the W-2 worker and informed her of new medical documentation that she wished the worker to review for possible extension. The worker scheduled an appointment for September 28, 2012.
13. On September 28, 2012, the worker met with the Petitioner who provided an MRI document that the worker could not interpret. The worker provided the Petitioner with a medical incapacity form to be completed. The worker again offered the Petitioner a CMD placement which the Petitioner declined. Another appointment was scheduled for October 5, 2012. The Petitioner did not attend the October 5, 2012 appointment and did not submit the medical incapacity form.
14. The MRI document provided to the agency on September 28, 2012 indicates that the MRI was done on August 31, 2012 and shows “early degenerative change in the cervical spine at the C3-C4 to C5-C6 levels.” It further indicates that there is “2mm broadbased posterior and right foraminal disc protrusion” at C5-C6.
15. On October 19, 2012, the Petitioner requested a fact finding hearing. A hearing was held on October 31, 2012. The agency’s action to deny the Petitioner an extension was upheld in a decision issued on November 8, 2012.
16. On November 19, 2012, the Petitioner filed an appeal with the Division of Hearings and Appeals.

DISCUSSION

W-2 is Wisconsin’s public assistance work program, and is outlined at Wis. Stat. §§49.141-.161. It supplanted the prior federal-state cash payment program, Aid to Families with Dependent Children (AFDC), described at Wis. Stat. §49.19.

I. STATUS OF FACT FINDING RECORD

The first task of a departmental reviewer, such as this hearing examiner, is to determine whether the fact finding record is sufficient for review. If it is not sufficient, the examiner may remand the matter back to the fact finder, conduct a new hearing (either in person or telephonically), or otherwise augment the record. See Wis. Stat. §49.152(2)(d). In the instant case, the paper record is adequate for the examiner to make sense of the case, and a supplementary hearing was not necessary. The findings of fact above are based on the fact finder’s decision, the tape recording of the hearing, and the fact finder’s file.

II. STANDARD OF REVIEW

A threshold analytical question is whether the departmental reviewer is reviewing this matter *de novo* or with some unspecified judicial standard of review. This entire due process function is subject to Wisconsin’s administrative procedure act, Chapter 227, Wis. Stats., because this type of case satisfies all

four prongs of the contested case hearing right test at Wis. Stat. §227.42(1). The Department has also made a public declaration that the entire review process at Wis. Stat. §49.152 is subject to Ch. 227's requirements in the document, Public Hearing Comment & Agency Response, Rule Number : DWD 12, p. 14:

The Department considers that the proceedings under paragraph DWD 12.22(2)(a) will be subject to the provisions of s. 227.44-.49, Wisconsin Stats. The Department does not want to deny anyone the opportunity for a court hearing; however, it is expected that very few cases will lead to court.

Based on the foregoing, the Division of Hearings and Appeals has concluded that the W-2 process function is subject to Ch. 227 requirements.

Having concluded that Ch. 227 applies to the W-2 process function, the Division also concluded that the departmental reviewer must engage in a *de novo* look at the fact finder's decision. In Reinke v. Personnel board, 53 Wis. 2d 123, 191 N.W.2d 833 (1971), the Wisconsin Supreme Court instructed state agency adjudicators to make *de novo* determinations, relying on the greater weight of the credible evidence, in administrative hearings. The Court specifically rejected the use of a judicial review (e.g., "substantial evidence" test) standard by the state agency, "unless expressly otherwise provided by statute." Id., pp. 134-136. There is no judicial review standard articulated in either the W-2 statute or promulgated rule. The only standard articulation undertaken by the Department is that the examiner's action is "a limited review of the record and the decision of the fact finder." *See W-2 Manual*, Chapter 19, § 19.3.0. This is not an articulated judicial review standard, and it is not legally binding on the examiner here.

III. W-2 EXTENSIONS

Under state law, participation in a W-2 subsidized position is generally limited to 60 months. Wis. Stats. § 49.145(2)(n). However, state law also allows for extensions of the 60 month limit "in accordance with rules promulgated by the department, that unusual circumstances exist that warrant an extension of the participation period." Wis. Stats. § 49.145(2)(n)3. State rules provide:

A Wisconsin works agency may extend the time limit only if the Wisconsin works agency determines that unusual circumstances exist that warrant an extension of the participation period. The department may review, approve or overturn a W-2 agency's decision related to an extension of the 60 month limit. In this paragraph, "unusual circumstances" means any of the following:

1. A W-2 participant is unable to work because of personal disability or incapacitation or is needed as determined by the agency to remain at home to care for a member of the W-2 group whose incapacity is so severe that without in-home care provided by the W-2 participant, the incapacitated W-2 group member's health and well-being would be significantly affected.
2. A W-2 participant has significant limitations to employment such as any of the following:
 - a. Low achievement ability, learning disability or emotional problems of such severity that they prevent the individual from obtaining or retaining unsubsidized employment, but are not sufficient to meet the criteria for eligibility for supplemental security income under 42

USC 1381 to 1383c or social security disability insurance under 42 UCS 401 to 433.

b. Family problems of such severity that they prevent the W-2 participant from obtaining or retaining unsubsidized employment.

3. The W-2 participant has made all appropriate efforts to find work and is unable to find employment because local labor market conditions preclude a reasonable job opportunity. In this subdivision, “reasonable job opportunity” means a job that pays minimum wage, and conforms to all applicable federal and state laws.

Wis. Admin. Code § DCF 101.09(n).

State policy, as set forth in the W-2 manual, is similar and provides that all time limit extension decisions are to be made on a case-by-case basis. It further states that to be eligible for an extension the individual must have fully participated in assigned W-2 activities and meet at least one of three criteria listed:

1. The participant has made all appropriate efforts to find unsubsidized employment and has been unable to do so because the local labor market conditions preclude a reasonable unsubsidized employment opportunity for that participant.

Making “all appropriate efforts to find unsubsidized employment” means that the participant has participated in all assigned activities, including job search. . . .

2. The participant is unable to work because of:

- A personal disability or incapacitation.
- A need to remain at home to care for a member of the W-2 Group . . .

3. The participant has significant limitations to employment such as any of the following:

- Low achievement ability, learning disability, or emotional problems of such severity that they prevent the individual from obtaining or retaining unsubsidized employment, but they are not sufficient to meet SSDI or SSI requirements.
- Family problems that affect one of the members of the W-2 Group . . .

A valid formal assessment must have been completed for reasons 2 and 3 above. If the individual does not have formal assessment information regarding barriers or limitations as described above and is not participating in all assigned activities, the FEP may deny a 60-month time limit extension (See 5.5.1 for more information on valid formal assessments).

W-2 Manual, §2.10.6.2.

The W-2 Manual states that after an initial time limit extension approval is granted, the W-2 agency can determine that a subsequent time limit extension period is necessary. There is no limit to the number of subsequent time limit extensions a participant may receive. W-2 Manual, § 2.10.6.4.2.

The fact-finder found that the Petitioner did not meet any of the criteria in § 2.10.6.2. With regard to Criteria #1, the fact finder concluded that the Petitioner failed to accept the CMD placement that could have provided the worker with proof with regard to whether the Petitioner could participate in work activities. Therefore, she did not participate in all assigned activities.

The fact finder further concluded the Petitioner did not meet Criteria #2 because the medical forms indicate she can perform limited work activities and therefore, she does not have a personal disability or incapacitation. The fact finder also concluded the Petitioner did not meet Criteria #3 because the Petitioner has a work history and though the Petitioner provide that she has emotional problems, the fact finder concluded they are not severe enough to prevent her from obtaining or maintaining employment.

The Petitioner asserts that in order to be considered for a W2T placement, she was determined to be incapacitated or incapable of performing a community service job. She also argues that the medical assessments conclude she has significant physical and mental health impairments that establish she is unable to work. The Petitioner further argues that the agency based its denial on the Petitioner's failure to identify new barriers and that this is not a proper basis for denial. The Petitioner notes that the purpose of the policy regarding extensions is a recognition of the fact that individuals may have disabilities that do not meet the standards for SSI but that do prevent individuals from obtaining or retaining employment. Finally, the Petitioner asserts that she is a disabled individual under the ADA and Rehabilitation Act and, as such, she is entitled to reasonable modifications and accommodations to participate in W-2. One reasonable modification or accommodation is to offer an extension of the W-2 time limit.

With regard to Criteria #1, I do not find that the Petitioner failed to meet the criteria based on her non-acceptance of a CMD placement. The Manual does not indicate that a participant is required to accept a CMD placement. It appears from the language of the Manual that accepting the CMD placement would be an agreement on the part of the Petitioner that she is no longer eligible for a paid placement. In this case, the Petitioner believed she was eligible for a paid placement based on her medical and mental health conditions. Because the Petitioner was not required to accept the CMD placement, it is not proper to find that non-acceptance of the CMD offer is a failure to participate in assigned activities.

With regard to Criteria #2 and #3, the weight of the evidence is sufficient to find that the Petitioner has physical and mental health impairments that are severe enough to prevent her from obtaining or retaining unsubsidized employment and that she meets the criteria for an extension. The conclusions of Dr. Thomas King and Dr. Withers are similar in that they concluded that the Petitioner's physical impairments limit her ability to work to 2 or 3 days/week, 2 – 4 hours/day. They also both concluded that her physical impairments would cause her to miss work at least 2 – 3 days/month. While the assessments indicate that the Petitioner's physical impairments do not render her completely incapable of working, the mental health assessment by Mr. Fossie concludes that her emotional and mental health impairments are severe enough to prevent her from working. There was no evidence presented by the agency to demonstrate that this assessment is not accurate. I have no information as to why the Petitioner was not found disabled by the Social Security Administration. However, as the Petitioner correctly points out, the criteria for a W-2 extension explicitly apply to individuals with disabilities that are not sufficient to meet SSDI or SSI requirements (see W-2 Manual, § 2.10.6.2).

Therefore, based on the totality of the evidence, I must conclude that it is sufficient to demonstrate that the Petitioner meets Criteria #3 that she has emotional problems of such severity that they prevent the Petitioner from obtaining or retaining unsubsidized employment. Further, I conclude that the severity of the emotional problems together with the significant physical limitations noted by Drs. Thomas-King and Withers render the Petitioner disabled or incapacitated such that she also meets Criteria #2. Based on the conclusion that she meets the criteria, the Petitioner is eligible for an extension of W-2.

CONCLUSIONS OF LAW

The agency did not properly deny the Petitioner's request for an extension of the W-2 time limits based on physical and mental health impairments. The Petitioner meets the criteria for a W-2 extension.

NOW, THEREFORE, it is

ORDERED

That this matter is remanded to the agency to take all administrative steps necessary to rescind its denial of the Petitioner's request for an extension of the W-2 time limit and find the Petitioner eligible for an extension of W-2 retroactive to September 1, 2012. The agency shall provide the Petitioner with all W-2 benefits to which she is entitled based on eligibility retroactive to September 1, 2012. These actions shall be completed within 10 days of the date of this decision.

REQUEST FOR A NEW HEARING

This is a final fair hearing decision. If you think this decision is based on a serious mistake in the facts or the law, you may request a new hearing. You may also ask for a new hearing if you have found new evidence which would change the decision. To ask for a new hearing, send a written request to the Division of Hearings and Appeals, P.O. Box 7875, Madison, WI 53707-7875.

Send a copy of your request to the other people named in this decision as "PARTIES IN INTEREST." Your request must explain what mistake the Administrative Law Judge made and why it is important or you must describe your new evidence and tell why you did not have it at your first hearing. If you do not explain these things, your request will have to be denied.

Your request for a new hearing must be received no later than 20 days after the date of this decision. Late requests cannot be granted. The process for asking for a new hearing is in Wisconsin Statutes § 227.49. A copy of the statutes can found at your local library or courthouse.

APPEAL TO COURT

You may also appeal this decision to Circuit Court in the county where you live. Appeals must be served and filed no more than 30 days after the date of this hearing decision (or 30 days after a denial of rehearing, if you ask for one).

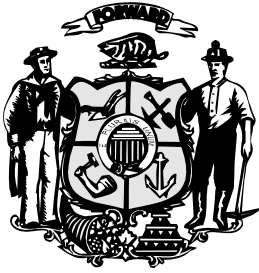
For purposes of appeal to circuit court, the Respondent in this matter is the Department of Children and Families. Appeals must be served on the Secretary of that Department, either personally or by certified mail. The address of the Department is 201 E. Washington Avenue, Second Floor, Madison, WI 53703-2866.

The appeal must also be served on the other "PARTIES IN INTEREST" named in this decision. The process for appeals to the circuit court is in Wisconsin Statutes, §§ 227.52 and 227.53.

Given under my hand at the city of ,
Wisconsin, this 26th day of March, 2013

\s Debra Bursinger
Administrative Law Judge
Division of Hearings and Appeals
/

cc:



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The preceding decision was sent to the following parties on March 26, 2013.

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